Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

GEORGE AUBIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTION PRESENTED

This case involves a challenged jury instruction in a prosecution for conspiracy, bank fraud and wire fraud, which instruction had the effect of directing a verdict for the prosecution on an essential element of the crimes. The challenged instruction was:

> Officers, directors, or other employees of a financial institution ***cannot*** validate a fraud on the institution. Therefore, knowledge of bank fraud by officers, directors or other employees of the institution ***is not*** a defense to the charge of bank fraud. (emphasis added)

The statutes under which the Petitioner was prosecuted require a jury determination that he possessed the intent to defraud. The Petitioner was an outsider, not an officer or director of the bank. The core of the defense was that he had no intent to defraud, and indeed, had made full disclosure to the chief executive officer and sole shareholder of the institution, as well as others. The government argued that the loan documents and the very "structure" of the transaction concealed Petitioner's involvement and the true use of the loan proceeds. This instruction mandatorily directed the jury that full disclosure to the officers and directors of the corporation alleged to be the victim of the fraud **cannot** "validate" a fraud, and **is not** a defense, thus instructing the jury that full disclosure was not relevant to the issue of the Petitioner's intent to defraud. The questions presented are:

I. Does an instruction to the jury that knowledge of the officers, directors and other employees of an alleged corporate victim of fraud *cannot* "validate" a fraud or be a defense to the charge of fraud constitute an impermissible

instructed verdict, or create a mandatory presumption relieving the prosecution of its' burden of proof, in violation of the Fifth Amendment right to due process and the Sixth Amendment right to have a jury finding on every essential element of the charged crime?

II. In the alternative, is there a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of constitutionally relevant evidence?

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Petitioner, George Aubin, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

CITATION TO THE OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *U.S. v. Aubin*, 87 F.3d 141 (5th Cir., 1996), and was issued June 24, 1996, under Cause No. 94-10954, and is attached to this petition as Appendix A. The order denying rehearing was filed October 3, 1996, and is attached as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was issued on June 24, 1996, and rehearing was denied on October 3, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves:

1. The Fifth Amendment to the United States Constitution, which provides, in pertinent part: "No person shall be ... deprived of life, liberty, or property, without due process of law."

2. The Sixth Amendment to the United States Constitution, which provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ...."

3. 18 U.S.C. § 371, which provides in pertinent part:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both."

4. 18 U.S.C. § 1343, which provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both."

5. 18 U.S.C. § 1344, which provided, in pertinent part, at the time applicable to this offense:

> "Whoever knowingly executes, or attempts to execute, a scheme or artifice--
> (1) to defraud a federally chartered or insured financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

Louis Reese (Reese) owned or controlled a substantial tract of land at the intersection of two of the most heavily traveled freeways in Dallas, Texas. Reese sold land and options on land totaling 41 acres to Haft, Inc. (Haft), a corporation controlled, according to the government, by Reese, James Hague (Hague) and George Aubin (Petitioner), for approximately $14 million. Simultaneously, Haft sold the land to Hague Enterprises, Inc. (Hague Enterprises), for approximately $28 million. Hague Enterprises, according to the government, was controlled by the same three individuals.

Jarrett Woods (Woods) was the **chief executive officer, the sole shareholder** and a director of Western Savings Association (Western). Western loaned approximately $31 million to Hague Enterprises, secured by the 41 acres and with Hague's personal guaranty. Western also received an interest in any future profits from the development or resale of the property. The value of the land, as substantiated by appraisals conceded at trial by the government to be valid, exceeded the loan amount. Woods, Reese, Hague and Petitioner all anticipated enormous profit from development and sale of the Dallas property.

The profit earned by Haft from the sale to Hague Enterprises was funded to another corporation, and used to partially fund the purchase of a Kentucky horse farm. The

government argued that Petitioner was the principal beneficial owner of the Kentucky property, and that the "land flip" was designed to obtain money for the purchase of the Kentucky property without disclosing the true identity of the beneficiaries of the loan from Western, or the true purpose of the transaction, *i.e.*, the funding of the Kentucky purchase. The alleged reason for this failure to disclose was the government's claim that regulatory scrutiny would have followed from a loan of this size made from Western to Petitioner, or secured by a Kentucky horse farm. However, the government stipulated at trial that there was no prohibition imposed by the applicable regulations, or the regulators, preventing Western from engaging directly in transactions with Petitioner.

Woods plead guilty to other charges involving his operation of Western, and cooperated with the government, providing the primary testimony for the government against Petitioner. However, there was no evidence that Woods was acting for any self-interest in this transaction, but rather he testified he was acting solely for what he perceived to be the best interest of Western. Woods clearly testified that he had complete knowledge of the transactions, and dictated the structure of the deal. Accordingly, nothing was misrepresented to Woods, or other employees and attorneys for Western working with Woods.

HOW THE QUESTIONS PRESENTED WERE DECIDED BELOW

The United States Court of Appeals for the Fifth Circuit affirmed the conviction despite the challenge to the instruction, holding that the instruction **"does correctly state the law applicable to this case under *United States v. Saks*, 964 F.2d 1514 (5th Cir. 1992)"** (emphasis added), and that the general "good faith" instruction left the jury free to

consider the defense, but that the jury rejected the defense and found an intent to defraud. *United States v. Aubin*, 87 F.3d 141, 148 (5th Cir. 1996).

REASONS WHY THE WRIT SHOULD BE GRANTED

This Court should review the determination of the United States Court of Appeals for these reasons:

(1) The decision of the Court of Appeals conflicts with relevant decisions of this Court, which hold that the Fifth and Sixth Amendments to the United States Constitution prohibit an instruction to the jury that is, in effect, a directed verdict for the government, or that create a mandatory presumption precluding the jury from considering relevant evidence.

(2) The decision of the Court of Appeals decides an important question of federal law that should be determined by this Court when it holds that an instruction to the jury stating that evidence of full disclosure to the officers, directors or other employees of a corporation *cannot* provide a defense under the federal bank and wire fraud statutes (18 U.S.C. §§ 1343 and 1344) is a correct statement of the law.

(3) The decision of the Court of Appeals conflicts with the decision of the Court of Appeals for the Second Circuit in *United States v. D'Amato,* 39 F.3d 1249 (2nd Cir. 1994), which held that an outside party cannot be found to intend to defraud a corporation if an appropriate corporate agent, who appears to be unconflicted and acting in good faith, has full disclosure. Thus, this case presents the opportunity for the Court to clarify an issue arising frequently in fraud-related prosecutions involving the participation of an insider, including when the knowledge of a corporate agent should be imputed to the corporation.

I. DOES AN INSTRUCTION TO THE JURY THAT KNOWLEDGE OF THE OFFICERS, DIRECTORS AND OTHER EMPLOYEES OF AN ALLEGED CORPORATE VICTIM OF FRAUD *CANNOT* "VALIDATE" A FRAUD OR BE A DEFENSE TO THE CHARGE OF FRAUD CONSTITUTE AN IMPERMISSIBLE INSTRUCTED VERDICT OR CREATE A MANDATORY PRESUMPTION RELIEVING THE PROSECUTION OF ITS' BURDEN OF PROOF IN VIOLATION OF THE FIFTH AMENDMENT RIGHT TO DUE PROCESS AND THE SIXTH AMENDMENT RIGHT TO HAVE A JURY FINDING ON EVERY ESSENTIAL ELEMENT OF THE CHARGED CRIME?

The Fifth and Sixth Amendments to the Constitution give a criminal defendant the right to have a jury find him guilty of all of the elements of the crime with which he is charged. *United States v. Gaudin*, ___ U.S. ___, 115 S.Ct. 2310, 2314, 132 L.Ed.2d 444 (1995); *Sullivan v. Louisiana*, 508 U.S. ___, 113 S.Ct. 2078, 2080, 124 L.Ed.2d 182 (1993). This right prohibits a jury charge which creates an evidentiary presumption that has the effect of relieving the government of its burden of persuasion beyond a reasonable doubt of every essential element of the crime. *Francis v. Franklin*, 471 U.S. 1301, 105 S.Ct. 1965, 1970, 85 L.Ed.2d 472 (1985). This Petitioner was deprived of that right by a specific instruction to the jury that directed the jury, using mandatory language, that disclosure to officers, directors and other employees of the institution was not a defense to the charged crimes, all of which required the jury to find an intent to defraud. This constitutional error requires a new trial on all three counts of conviction.

In this case, petitioner was charged with conspiracy, bank fraud and wire fraud. These offenses require an intent to defraud as essential elements of the crimes, as both the

bank and wire fraud statutes criminalize schemes to defraud. The term "scheme to defraud" includes false or fraudulent pretenses or representations intended to deceive others in order to obtain something of value from the institution to be deceived. *United States v. Dobbs*, 63 F.3d 391, 395 (5th Cir. 1995). Intent to defraud exists if the defendant acts knowingly with the specific intent to deceive for the purpose of causing financial loss to another or bringing about some financial gain to himself. *United States v. Jiminez*, 77 F.3d 95, 97 (5th Cir. 1996).

The jury was instructed to determine if Petitioner possessed the requisite intent to defraud. However, the jury was then instructed:

> Officers, directors, or other employees of a financial institution ***cannot*** validate a fraud on the institution. Therefore, knowledge of bank fraud by officers, directors or other employees of the institution ***is not*** a defense to the charge of bank fraud. (emphasis added)

This instruction amounts to a directed verdict that Petitioner defrauded the bank, by negating his position that full disclosure to officers and directors of the bank indicated that he had not intended to defraud the bank.

The Fifth Circuit found sufficient evidence of an intent to defraud by Petitioner because the parties "deliberately structured the transaction so that the loan documents would not reveal that Aubin or Reese were involved in the deal." *United States v. Aubin*, 87 F.3d 141, 146 (5th Cir. 1996). Even assuming that the concealment of

the role of Aubin and Reese was a material matter[1], the finding of fraud required evidence of misrepresentation or concealment of that material matter from Western. Woods, the CEO and the sole shareholder of Western, testified, however, that he was not only fully knowledgeable of the involvement of Reese and Petitioner, but that Woods and others representatives of Western were actively involved in the structuring of the transaction. Accordingly, the principle defense position was that Petitioner had not intended to misrepresent or conceal anything from Western, since Western's chief executive and sole shareholder, as well as other employees and the attorneys representing Western, were fully informed.

Thus, the issue could be framed quite clearly. Petitioner argued that he had made full disclosure of his involvement in the transaction and the use of the proceeds to buy the Kentucky property, and that this disclosure had been made to the chief executive officer and the sole shareholder of the institution, as well as to others. To suggest that Woods had "apparent authority" to represent Western would be an incredible understatement. The core of the defense was that, with such disclosure and knowledge by the principal of the

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[1] Several courts have held that the failure to disclose the true beneficiary of a loan is not fraud, so long as the "named borrower" has both the capacity and the intent to repay the loan. *United States v. Gallagher*, 576 F.2d 1028 (3rd Cir. 1978); *United States v. Gens*, 493 F.2d 216 (1st Cir. 1974); *United States v. Docherty*, 468 F.2d 989 (2nd Cir. 1972). Where the named debtor is both financially capable and fully understands that it is his responsibility to repay, a loan to him cannot--absent other circumstances--be characterized as a sham. In such a situation, thee are really two loans: one from the bank to the named debtor, the other from the named debtor to the third party. The bank official has simply granted a loan to a financially capable party, which is what he should do. There is no natural tendency to defraud the bank. *Gens, supra* at 222.

institution, there could be no fraud. The government argued that Woods was in collusion with Petitioner and the others to deceive the institution, although exactly who constituted the institution in the eyes of the government never became quite clear. In finding sufficient evidence to affirm the convictions, despite the knowledge of the insiders, the Fifth Circuit stated:

> In essence, Aubin argues that Woods' knowledge, as owner of Western Savings and Loan, should be imputed to Western, and that given the full disclosure to Woods there could be no finding of an intent to defraud Western. This argument is without merit. In *United States v. Saks*, 964 F.2d 1514 (5th Cir. 1992), where the appellants had colluded with savings and loan officers who were co-chairmen of the bank's board of directors and owned a controlling interest in the bank, this Court held that"(i)t is the financial institution itself--not its officers--that is the victim of the fraud the statute proscribes." 964 F.2d at 1518. After *Saks*, it is clear that bank officers, such as Woods, "with authority to bind their banks to others can nevertheless defraud the institutions they serve." *Id.*

Aubin, supra at 146. Indeed, the Fifth Circuit had addressed a similar factual scenario in the case of *United States v. Saks*. That opinion had established the law in the Fifth

Circuit[2] that an outsider could collude with an insider to defraud the insider's institution. That proposition, however, hardly seems to be remarkable. Petitioner is not arguing that an insider can never defraud the institution.

As set forth above, the gist of fraud is the misrepresentation. There is no proof that Petitioner ever orally misrepresented the transaction to any alleged victim. Rather, the Fifth Circuit, as set forth above, relied upon the fact that the transaction had been deliberately structured to omit the involvement of Aubin and Reese, apparently from the written record of the transaction. In evaluating the intent of Petitioner to defraud by such an omission, clearly the fact that he made full disclosure to Woods and other representatives of Western is relevant evidence, and evidence that should be carefully weighed by the jury in reaching a determination of his intent.

The government requested the exact language of the challenged jury instruction as government's proposed instruction No. 23. In the proposed instruction, the government, as authority for the paragraph at issue, cites to *United States v. Cauble*, 706 F.2d 1322, 1353-4 (5th Cir. 1983), *cert denied*, 465 U.S. 1005 (1984). There is no instruction given in *Cauble* that is even vaguely similar to that proposed by the government and given in this trial. In *Cauble*, the defendant argued that ratification of a transaction by the board of directors of a bank was a complete defense,

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[2] If, in fact, the law became "clear" only after the *Saks* opinion was written in 1992, then it must not have been clear at the time of the acts of Petitioner that give rise to this prosecution. Thus, the *Saks* opinion could not have served warning on the Petitioner to act differently than he did.

and mandated reversal of the convictions.[3] The Fifth Circuit gave lengthy consideration to the issue of whether "consent" by the board of directors was a complete, or *per se*, defense, but concluded that it was not an absolute defense. The Court concluded:

> Approval by the bank is a factor, indeed an important one, to be considered in deciding whether the making of the loan itself constituted a misapplication and whether a defendant had the intent to injure or defraud the bank required to sustain a conviction under § 656. But it is not a complete defense.

Id. at 1354. In fact, the Court noted in Footnote 137, on page 1355 of the opinion, that had it been requested, the trial court should have given a jury instruction that the approval by the board of directors of the bank should be considered in determining intent. Thus *Cauble* actually held that the disclosure to the directors of the bank was **an important factor** to be considered by the jury, and that the jury should be so instructed. It is inconceivable that this case be cited to support the proposition that the jury should be instructed that disclosure to the directors of the bank could never be a defense to a charge requiring proof of an intent to defraud.

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[3] Cauble was charged with willful misapplication of the bank's funds in violation of 18 U.S.C. § 656, not with either bank fraud or wire fraud. However, conviction of this charge required the jury to find an intent to defraud, just as in the charges herein.

In its opinion, the Fifth Circuit affirmed the conviction despite the challenged jury instruction, stating only that the instruction "does correctly state the law applicable to this case under *United States v. Saks*, 964 F.2d 1514 (5th Cir. 1992)." *Aubin, supra* at 148. In *Saks*, the precedent relied upon by the Fifth Circuit, the court did find that insiders could defraud their own institution, as discussed above. However, the court's finding was made in relation to the appellants' challenge to the sufficiency of the evidence. There was no instruction to the jury even similar to that given herein to the jury in *Saks*, and no discussion of such an instruction. Instead, *Saks* only restates *Cauble*, in holding that the knowledge of corporate insiders with apparent authority to act for the bank is not a *per se* defense that precludes a conviction. Nothing in *Saks* suggests that a jury should ever be instructed not to consider evidence of disclosure to and knowledge by the bank's officers and directors in determining the issue of intent. Instead, as *Cauble* correctly states, that knowledge is obviously a very important factor that should be considered by the jury.

In fact, if this instruction is taken literally, and we must assume that the jury did so, the question becomes: how could a defendant ever make full disclosure? The Fifth Circuit, in it's opinion in *Saks*, states that it is the financial institution itself, and not its officers, that is the victim of the fraud. However, the institution can act only through people, it's directors, officers and employees. From the defendant's perspective, the issue is not who is the victim, but to whom should the disclosure or the truthful representations be made. Petitioner must address his disclosure or his truthful representations to some person or persons Yet this jury was instructed that full disclosure or truthful representations (*i.e.* knowledge) to any person or persons is not a defense. That is the same thing as saying that full disclosure to or accurate knowledge by the institution is not a defense. How can a

jury be instructed that full disclosure and accurate knowledge is not a defense to fraud? Yet this instruction cannot be interpreted in any other way. If this instruction is a correct statement of the law, the defendant is faced with an impossibility. There is no way he can avoid criminal conduct.

The mandatory language of the instruction eliminated the issue of Woods' knowledge from consideration by the jury. If it followed the instruction, the jury could never find that Woods' knowledge negated a finding that Petitioner intended to defraud, or be a defense that Petitioner justifiably relied upon an apparent authority of Woods to represent Western. The jury certainly must be able to at least consider the relevant evidence without a very specific instruction directing that the evidence can have no legal effect.

Clearly, at least in some circumstances, knowledge of corporate representatives can cause a jury to infer that there was no intent to defraud. In fact, it can be a complete defense, at least in the Second Circuit. For instance, the Second Circuit reversed and dismissed a mail fraud conviction, holding that the defendant cannot be found to intend to defraud a corporation through misleading conduct if he follows the instructions of an appropriate corporate agent who appears to be unconflicted and acting in good faith. *United States v. D'Amato*, 39 F.3d 1249 (2nd Cir. 1994). The issue in *D'Amato* was not the failure to instruct the jury, but rather the Circuit Court reversed, finding insufficient evidence that the defendant did not justifiably rely upon the apparent authority of the corporate representative. In this case, the Fifth Circuit removed the entire issue from the jury, and instead, directed a verdict by instructing the jury that Petitioner could never have justifiably relied upon the apparent authority of Woods,

despite Woods' position as CEO and one hundred percent owner of Western. Petitioner is not arguing that there was insufficient evidence, but instead, that he was deprived of a jury determination of the issue.

This is not a case of an ambiguous instruction, but rather one of a clearly erroneous instruction. The jury verdict rendered after this instruction amounts to no jury determination at all. Where there has been a failure to obtain a jury determination on an element of the crime, reversal of the conviction is required. *United States v. Gaudin*, ___ U.S. ___, 115 S.Ct. 2310 (1995) (reversing a conviction for making false statements because of a failure to instruct the jury to determine the materiality of the false statement); *Sullivan v. Louisiana*, 508 U.S. ___, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)(reversing a state murder conviction becasue of an erroneous instruction defining reasonable doubt); *Francis v. Franklin*, 471 U.S. 1301, 105 S.Ct. 1965, 85 L.Ed.2d 472 (1985) (reversing a state court murder conviction becasue of an instruction creating an impermissible mandatory presumption in favor of the government). Furthermore, where the Court cannot ascertain whether the defendant has been punished for noncriminal conduct, the conviction may not be upheld. *Chiarella v. United States*, 445 U.S. 222, 100 S.Ct. 1108, 1119, 63 L.Ed.2d 348 (1980). In *Chiarella*, the Court reversed a securities fraud conviction where the jury was not properly instructed on the need to determine that the defendant had a duty to disclose the alleged undisclosed material information.

Even if the issue of disclosure to Woods is considered to be a defensive issue, as the Fifth Circuit seemed to suggest in *Cauble*, Petitioner was clearly entitled to an instruction that presented his defense, rather than one that entirely removed it from consideration by the jury. A defendant is entitled to an instruction as to any recognized

defense for which there exists sufficient evidence for a reasonable jury to find in his favor. *Mathews v. United States*, 485 U.S. 58, 108 S.Ct. 883, 887, 99 L.Ed.2d 54 (1988).

The Fifth Circuit opinion also notes that the trial court gave a general instruction that a finding that the defendant acted in "good faith" would negate a finding that he possessed an intent to defraud, and that this instruction served to somehow ameliorate the effect of the challenged instruction. Clearly, the good faith instruction does nothing to explain or clarify the instruction that disclosure to Woods and others cannot validate the fraud and is not a defense to fraud. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. *Francis v. Franklin, supra,* 105. S.Ct. at 1975. The unstated implication by the Fifth Circuit is that the error, if any, is harmless. However, where there has been no jury verdict on an essential issue, the error cannot be harmless. *Sullivan v. Louisiana, supra,* 113 S.Ct. at 2082.[4] Furthermore, where the error instructed the jury to disregard the core of the defense, the effect can scarcely be characterized as harmless.

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[4] The Court has recently granted certiorari in *Johnson v. United States*, Docket No. 96-203, 65 U.S.L.W. 3368, where an issue presented concerns whether a harmless error analysis is applicable to a *Gaudin* error to instruct the jury to determine the issue of materiality of an alleged false statement.

II. IN THE ALTERNATIVE, IS THERE A REASONABLE LIKELIHOOD THAT THE JURY APPLIED THE CHALLENGED INSTRUCTION IN A WAY THAT PREVENTED THE CONSIDERATION OF CONSTITUTIONALLY RELEVANT EVIDENCE?

Petitioner believes that the challenged instruction can only be read to remove the issue of his justifiable reliance upon the apparent authority of Woods from the jury. However, in the alternative, if the Court believes that the challenged instruction is ambiguous, then Petitioner argues that there is a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of constitutionally relevant evidence concerning his reliance upon the apparent authority of Woods and others.

Where the instruction is ambiguous, and therefore subject to an erroneous interpretation by the jury, the Court's inquiry is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316 (1990); *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). *Boyde* involved an instruction that was only arguably ambiguous, and the Court concluded there was little likelihood that it was misunderstood by the jury. The *Boyde* standard of review is not applicable to cases of a clearly erroneous instruction.

It is difficult to fathom an interpretation of the instruction challenged by the Petitioner herein that means something other than the literal meaning of the words; the instruction clearly states that knowledge of the officers, directors or other employees of the institution **is not a**

defense to the charge of bank fraud. Accordingly, the *Boyde* standard should not apply because the instruction is unambiguous and clearly erroneous.

However, in the alternative, should the Court aply the *Boyde* standard, Petitioner clearly satisfies the standard. As established above, the evidence of disclosure to and knowledge of officers and directors of Western was clearly constitutionally relevant evidence. Their is a reasonable likelihood that the jury applied the instruction in a way to prevent their consideration of that evidence. How else could the jury interpret the instruction? They were instructed by the trial judge that knowledge by Woods cannot validate the actions of Petitioner, and is not a defense to the charges. Simply put, the language could not be more clear.

CONCLUSION

For the foregoing reasons, this Court should grant review of the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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January 2, 1997

APPENDIX A

U.S. COURT OF APPEALS
FILED
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CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-10954

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GEORGE AUBIN,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

Before WISDOM, EMILIO M. GARZA, and PARKER, Circuit Judges.

ROBERT M. PARKER:

Defendant Aubin was convicted of conspiracy to defraud the United States, bank fraud, and wire fraud. He appeals his convictions and sentence. Finding no error, we affirm.

I. FACTS

In the Summer of 1984, Defendant, George Aubin, decided to buy a horse farm in Kentucky at a cost of approximately 22 million. The charges against Aubin arose out of a scheme to obtain funding from Western Savings and Loan for the purchase of the horse farm. Western was owned by Aubin's friend, Jarrett Woods. Western could not lend money to Aubin directly because of federal regulatory scrutiny of Aubin's activities. Together with James Hague and Louis Reese, Aubin arranged a "land flip" -- the purchase and simultaneous resale of the same property at a higher price.

Reese and others sold, for $14 million, a large piece of property near the LBJ Freeway and the Central Expressway in Dallas, Texas to Haft, Inc., which Aubin, Reese, and Hague controlled. Haft immediately sold the property to Hague Enterprises, which was also controlled by Aubin, Reese, and Hague, for $28 million. The profit from the transaction was sent via wire transfer to another corporation set up by the parties to carry-out the purchase of the horse farm.

The land flip was designed to obtain cash for the purchase of the horse farm without disclosing the identity of the parties involved and without disclosing the true purpose of the transaction. None of the loan documents revealed Aubin's interest in the transaction, or the fact that the profit was to be used for the purchase of the horse farm. Haft, the entity that realized profit in the land flip, never filed income tax returns with the Internal Revenue Service. Haft was nominally controlled by Aubin's attorney, Richard Fuqua.

Aubin and co-defendant Fuqua were indicted by a grand jury in February of 1993. They were charged with

conspiracy to commit offenses against the United States and to defraud the United States, in violation of 18 U.S.C. §371 (Count 1); bank fraud, in violation of 18 U.S.C.§§ 1344 & 2 (Count 2); making false entries in the books and records of a federally insured credit institution, in violation of 18 U.S.C. §§ 1006 & 2 (Counts 3 & 4); and wire fraud, in violation of 18 U.S.C. §§ 1343 & 2 (Count 5). Aubin and Fuqua were tried in May and June of 1994. The jury returned verdicts of not-guilty as to Fuqua, but returned verdicts of guilty as to Defendant Aubin on counts 1, 2, and 5.

In October 1994, the district court sentenced Aubin to 60 months imprisonment of Count 1 and 60 months on each of Counts 2 and 5 to be served concurrently with each other and consecutive to the sentence on Court 1. The district court also ordered that Aubin make restitution in the amount of $42,773,552.25 to the Resolution Trust Corporation. Aubin timely filed this appeal.

II. DISCUSSION

A. SUFFICIENCY OF THE EVIDENCE

Among Aubin's numerous arguments on appeal, he challenges the sufficiency of the evidence supporting his convictions. In challenging the sufficiency of the evidence, a defendant "faces an imposing standard of review." *United States v. Parekh*, 926 F.2d 402, 405 (5th Cir. 1991). A court reviewing the sufficiency of the evidence must "determine whether, viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, a rational jury could have found the essential elements of the offenses beyond a reasonable doubt." *United States v. Charroux*, 3 F.3d 827, 831 (5th Cir. 1993) (quoting

United States v. Pruneda-Gonzalez, 953 F.2d 190 , 193 (5th Cir.), *cert. denied*, 504 U.S. 978 (1992).

In the present case, the district court deferred ruling on Aubin's motion for judgment of acquittal until after the jury returned its verdict. Because the defendant was entitled to a ruling on his motion prior to presenting his defense, this Court will only consider the evidence presented in the Government's case-in-chief in assessing the sufficiency of the evidence. *United States v. Casilla*, 20 F.3d 600, 606 (5th Cir.), *cert. denied*, 115 S.Ct. 240 (1994); *United States v. Rhodes*, 631 F.ed 43, 44-45 (5th Cir. 1980). Although it was error for the district court to defer ruling on Aubin's motion, such an error is harmless where, as here, the evidence presented during the government's case-in-chief is sufficient to support the verdict. *Rhodes*, 631 F.2d at 45.

1. Count 1, Conspiracy to Impede or Impair the IRS

On this charge, under 18 U.S.C. § 371, the Government bore the burden of proving beyond a reasonable doubt that Aubin agreed with at least one other conspirator to defraud the United States by obstructing the tax collecting function of the IRS, and one overt act in furtherance of the conspiracy. *United States v. Chesson*, 933 F. 2d 298, 306 (5th Cir.), *cert. denied*, 502 U.S. 981 (1991). Because Aubin claimed that the statute of limitations barred this prosecution, the Government was also required to show that an overt act was committed within the six years preceding the date of the indictment.

For the evidence to sustain the conviction, it is not necessary that the evidence show an express or formal agreement; evidence of "a tacit understanding is sufficient." *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975);

United States v. Hopkins, 916 F.2d 207, 212 (5th Cir. 1990). Louis Reese testified that one of the purposes of structuring the transaction as a land flip through Haft, Inc., was to "impede the IRS from collecting taxes by making the deals so complicated that . . . it was impossible to tell who owed taxes, what taxes might be owed and what the amount was." Reese also testified that he thought it was a part of the plan from the beginning that Haft would disappear. James Hague testified that filing tax returns from Haft would have been inconsistent with the secrecy necessary for the arrangement to succeed. Both Reese and Hague provided ample testimony regarding Aubin's central role in the transaction. This evidence is more than sufficient to allow a reasonable jury to find at least a "tacit understanding" that the parties would conceal Haft's profit from the IRS.

The government also presented sufficient evidence of an overt act in furtherance of the conspiracy within the statute of limitations period. The statute of limitations under the tax code for a conspiracy to defraud the United States in violation of 18 U.S.C § 371 is six years. 26 U.S.C. § 6531 (1). The grand jury returned the indictment in this case on February 24, 1993. Therefore, to sustain the conviction, there must be evidence of an overt act after February 23, 1987.

The evidence showed that the profit from the LBJ land flip was transferred to Slew Farms, a Cayman corporation set up by Hague, Reese, and Aubin. Hague, Reese, and Aubin, in turn, set up Cayman corporations to own their respective shares in Slew Farms. The corporation set up to hold Aubin's share was Sigma Group. The evidence also showed that Slew Farms owned a Kentucky corporation, Warrenton Farms, that was formed to own the horse farm. Aubin was the sole shareholder of Warrenton Farms.

On August 26, 1988, after federal regulators had made a criminal referral relating to the LBJ transaction, and after foreclosure had been ordered on the horse farm, Aubin caused Warrenton Farms to file for bankruptcy. The bankruptcy petition listed the IRS as a creditor having a priority in an unknown amount. However, the bankruptcy petition also falsely reported that Sigma Group had a secured claim against the property of Warrenton Farms in the amount of $15,614,691. Warrenton Farms supposedly incurred this debt on October 23, 1984, the date the profit from the LBJ land flip was wired to Kentucky and the purchase of the horse farm was closed. The government presented evidence that this loan was a fiction, and that the supporting documentation had been backdated well after the fact to create the appearance of a loan. The government also presented evidence that Aubin directed that the loan documentation be created. Thus, the bankruptcy petition indicated that a fictional loan, rather than the unreported profit from the LBJ land flip, was the source of the horse farm purchase money. From this evidence, a reasonable jury could conclude that the bankruptcy petition was designed to conceal from the IRS the transfer of Haft's unreported profit to Warrenton Farms, and therefore constituted an overt act in furtherance of the conspiracy to defraud the United States.

2. Count 2, Bank Fraud

Aubin contends that there is no evidence that he intended to defraud Western Savings and Loan in violation of 18 U.S.C. § 1344. However, the very structure of the transaction would allow a reasonable inference of an intent to defraud. The evidence clearly indicates that the parties deliberately structured the transaction so that the loan documents would not reveal that Aubin or Reese were involved in the deal. The transaction was also designed to hide the fact that proceeds from the loan to Hague

Enterprises were to be used to purchase the horse farm. Despite this evidence, Aubin contends that given Jarrett Woods' involvement in the transaction, and the full disclosure made to him, full disclosure was, in effect, made to Western.

In essence, Aubin argues that Woods' knowledge, as owner of Western Savings and Loan, should be imputed to Western, and that given the full disclosure to Woods there could be no finding of an intent to defraud Western. This argument is without merit. In *United States v. Saks*, 964 F.2d 1514 (5th Cir. 1992), where the appellants had colluded with savings and loan officers who were co-chairmen of the bank's board of directors and owned a controlling interest in the bank, this Court held that "[i]t is the financial institution itself--not its officers-- that is the victim of the fraud the statute proscribes." 964 F.2d at 1518. After *Saks*, it is clear that bank officers, such as Woods, " with authority to bind their banks to others can nevertheless defraud the institutions they serve." Id. It is also clear that bank customers like Aubin, "who collude with bank officers to defraud banks may also be held criminally accountable either as principals or aiders and abettors." *Id.* at 1518-19.

Aubin attempts to distinguish *Saks* on the basis of Woods' individual control over Western. However, the record indicates that Woods did not have unbridled discretion to make loans; the Western loan committee could veto his decisions, and he was concerned that the loan to Hague Enterprises would not be approved if the committee were aware of the facts. In fact, Woods knew that he could not tell the members of the loan committee the truth about the transaction because they would not want to do anything that might incur regulatory scrutiny. Thus, with respect to loan approval, Woods and Western were separate entities.

Aubin also relies on *FDIC V. ERNST & YOUNG*, 967 F.2d 166 (5th Cir. 1992). In *Ernst & Young* the FDIC, suing as Western's assignee, brought a negligence action against an accounting firm that had audited Western. Judgment was granted in favor of the accounting firm. In holding that Western had not relied on the audit, this Court held that Woods' knowledge of Western's actual financial condition was imputable to Western. However, this Court limited its "holding narrowly to the facts of this case under texas law--i.e. the FDIC, as assignee of a corporation with a dominating sole owner, sues an auditor for negligently performing an audit upon which neither the owner nor the corporation relied." 967 F.2d at 172. *Ernst & Young* is inapposite because it was an action for negligence under state law rather than a prosecution under a federal criminal statute, and because the FDIC merely stood in Western's shoes for purposes of its claim against the accounting firm. In any event, the rule of Texas law on which this Court relied in *Ernst & Young*--that an agent's knowledge is imputed to his principal--does not protect those who collude with an agent to defraud the principal. *Crisp v. Southwest Bancshares Leasing Co.*, 586 S.W.2d 610, 615 (Tex. Civ. App.--Amarillo 1979, writ ref'd n.r.e.). Thus. Aubin's arguments on this point are unavailing.

3. Count 5, Wire Fraud

Aubin contends that there is no sufficient evidence that he had the specific intent to defraud the victims named in the wire fraud count of the indictment. The indictment alleged that Aubin devised the scheme in question to defraud Western, the IRS, the Federal Home Loan Bank Board (FHLBB), and the Federal Savings and Loan Insurance Corporation (FSLIC). As we have already determined, there was sufficient evidence to allow the jury to conclude that Aubin and his co-conspirators intended to defraud Western

and the IRS. Both Reese and Woods testified that their scheme would also defraud the FHLBB and the FSLIC. The evidence clearly indicates that the parties knew they had to conceal the true nature of the transaction from federal regulators if the scheme was to succeed. Federal regulators had already issued a cease and desist order to at least one other savings and loan that had provided financing for Aubin's business ventures. Therefore, there is sufficient evidence to allow a reasonable juror to conclude that Aubin had the intent to defraud each of the victims alleged in the indictment.

B. STATUTE OF LIMITATIONS--WIRE FRAUD

Aubin also contends that the prosecution for wire fraud is barred by the statute of limitations. Generally, the five-year limitations period of 18 U.S.C. § 3282 is applicable to wire fraud violations. However, the district court held that the ten-year limitations period of 18 U.S.C. § 3293 for offenses affecting financial institutions applied in this case. The scheme or artifice to defraud that was the basis for the charge of wire fraud in this case was designed to defraud, among others, Western Savings and Loan. Since Western, a financial institution, was in fact defrauded in this case, and since there is no question that a wire transmission was used to execute this fraud, we hold that the district court was correct. The ten-year limitations period of 18 U.S.C. § 3293 is applicable, and the prosecution of this offense was not barred by the statute of limitations.

C. CONSTRUCTIVE AMENDMENT OF THE INDICTMENT

Aubin contends that the government constructively amended the indictment by proving a conspiracy to commit tax evasion rather than a conspiracy to defraud the United

States. This argument is completely without merit. The government presented evidence that Aubin and his co-conspirators agreed, among other things, not to file income tax returns for Haft, Inc. While such an agreement would constitute conspiracy to commit tax evasion, it is also completely consistent with the government's charge of conspiracy to impair or impede the lawful functions of the IRS. The fact that defendant's actions may have constituted violations of other uncharged offenses, does not make the government's presentation of evidence of such actions tantamount to a constructive amendment of the indictment.

D. JURY INSTRUCTIONS

With regard to the charge of conspiracy to defraud the IRS, Aubin contends that the district court erred in failing to limit the evidence of overt acts in furtherance of the conspiracy the jury was allowed to consider. Aubin points to no legal authority that would have justified limiting the evidence the jury was allowed to consider. Although Aubin does point to an instruction that seems to limit the overt acts the jury could consider against his co-defendant, Fuqua, Aubin fails to show error in the jury instructions regarding the conspiracy charge against him.

Aubin also contends that the district court denied him his right to have the jury consider his defense to the charge of bank fraud. The district court refused to give an instruction that Woods owned Western and that if Woods knowingly accepted the terms of the transaction then, as a matter of law, the parties could not have defrauded Western because Wood's knowledge would be imputed to Western. As discussed above, this requested instruction does not correctly state the law applicable to this case.

Aubin objects to the instruction the district court gave on this point:

> Officers, directors, or other employees of a financial institution cannot validate a fraud on the institution. Therefore, the knowledge of bank fraud by officers, directors, or other employees of the institution is not a defense to the charge of bank fraud.

This instruction does correctly state the law applicable to this case under *United States v. Saks*, 964 F.2d 1514 (5th Cir. 1992).

Aubin argues, however, that this instruction precluded his defense that he relied on Wood's knowledge and therefore did not intend to defraud Western. This argument is meritless. The district court instructed the jury that good faith constituted a complete defense to an offense requiring intent to defraud. The jury was free to consider, and Aubin did in fact argue, the defense that he relied on Wood's knowledge and apparent authority and never intended to defraud or mislead Western. The jury simply rejected this defense and found an intent to defraud.

Aubin also complains that the jury instruction on the wire fraud offense was flawed in that it did not require the jury to agree unanimously on which victims were intentionally defrauded. However, the district court did instruct the jury, generally, that to return a verdict,

> "each juror must agree to the verdict. In other words, your verdict must be unanimous."

When the district court gives a general unanimity instruction, there is no requirement that the judge also "separately instruct the jury to unanimously agree on the intended

victim." *United States v. St. Gelais*, 952 F.2d 90, 97 n.2 (5th Cir.), *cert. denied*, 506 U.S. 965 (1992).

E. LEGAL DUTY TO DISCLOSE

Aubin contends that the government should have been required to prove that he had a duty to disclose the information he is alleged to have concealed. However, the government's case was not based on a mere failure to disclose; instead, it was based on affirmative concealment intended to defraud. The government produced evidence of actions designed purposely to conceal the details of the transaction and Aubin's involvement. The government's evidence, as discussed above, is sufficient to support a jury finding of specific intent to defraud. There is no requirement under the federal fraud statutes that the government prove a duty to disclose other than the legal duty not to intentionally defraud. The cases cited by Aubin are inapposite.

F. THE GOVERNMENT'S DUTY TO DISCLOSE UNDER BRADY

In order to establish a due process violation under *Brady v. Maryland*, 373 U.S. 83 (1963), the defendant bears the burden of proving that (1) evidence was suppressed by the prosecution; (2) the evidence was favorable to the defense; and (3) the evidence was material either to guilt or to punishment. *Brady*, 373 U.S. at 87. Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

One group of information Aubin contends was suppressed is information regarding other loans with regard to which Aubin or companies he controlled were beneficiary or borrower. This is information about which Aubin should have known. *Brady* does not require the prosecution "to conduct a defendant's investigation or to assist in the presentation of the defense's case." *United States v. Marrero*, 904 F.2d 251, 261 (5th Cir.), *cert. denied*, 498 U.S. 1000 (1990). The purpose of the *Brady* rule is to "ensure that a miscarriage of justice does not occur, 'not to displace the adversary system as the primary means by which truth is uncovered.'" *United States v. Johnson*, 872 F.2d 612, 619 (5th Cir. 1989) (quoting *Bagley*, 473 U.S. at 675). Aubin does not show that this information was not available to him through due diligence.

Aubin also contends that the Government suppressed allegations that Reese obtained a fraudulent appraisal to support the Western funding for the LBJ/Central transaction. However, by a letter dated May 5, 1994, prior to trial, the Government disclosed this allegation.

Aubin also contends that the government suppressed a report of the Texas Savings and Loan Department concerning Western Savings and Loan as of December 1984. Aubin is in possession of a copy of the report and Western's response. Although Aubin contends that the report shows that the Texas S&L Department knew of his involvement in the transaction, he does not support this contention with specific citation, and he does not show any likelihood that the result of the trial would have been different if he had been in possession of this report prior to trial.

Aubin also contends that the Government should have disclosed FBI "302" reports of interviews with witnesses. With regard to the only witness specifically cited by Aubin,

Mr. Henry, the district court reviewed the FBI interview and indicated that it was completely consistent with Henry's testimony. Therefore, it could not have been helpful for impeachment as defendant claims. Aubin has not provided any reason to believe that any 302 reports might contain favorable or material information.

Aubin also contends that the government should have disclosed materials in possession of the Resolution Trust Corporation supporting a letter from the RTC dated August 31, 1994, concerning the amount of restitution defendant should be ordered to pay. The letter states, among other things, that "[t]he loan arrangements were designed to deceive Western in order to obtain funds for the use of Aubin and his co-conspirators." Contrary to Aubin's contention, this letter does not reflect any underlying exculpatory information.

Aubin contends that the government also suppressed evidence that would have significantly impeached Reese and Woods. The record is filled with evidence that would have impeached Reese and Woods. Evidence of their participation in the scheme in question and their involvement in other criminal and fraudulent activities was presented to the jury. Other impeachment evidence, if indeed there was any, would have been merely cumulative. Thus, Aubin has not met his burden of showing that the government suppressed any material evidence in violation of *Brady*.

G. OMISSIONS FROM THE RECORD

Aubin contends that several documents presented to the district court during trial were missing from the record on appeal. It appears that all of these documents have been the subject of motions to supplement, and now are a part of the record on appeal.

Aubin also complains that nine bench conferences conducted during the trial were not transcribed and are not part of the record on appeal. Defendant apparently has not made any attempt to determine the substance of those bench conferences and has only speculated as to their substance.

Where, as here, a "defendant is represented on appeal by counsel other than the attorney at trial, the absence of a substantial and significant portion of the record, even absent any showing of specific prejudice or error, is sufficient to mandate reversal." *United States v. Neal*, 27 F.3d 1035, 1044 (5th Cir.), *cert. denied* 115 S.Ct. 530 (1994). This does not mean that every failure to record, no matter how "small or insignificant, will work a reversal." *United States v. Selva*, 559 F.2d 1303 n.5 (5th Cir. 1977). The trial of this case lasted approximately a month. and the transcript is approximately 3,000 pages. The mere failure to transcribe 9 bench conferences does not necessarily establish the absence of a substantial and significant portion of the record. Since Aubin has not made any showing regarding the possible substance of these bench conferences, we will not find them to constitute a substantial and significant portion of the record.

H. SENTENCING

Aubin contends that the district court did not adequately evaluate the calculation of the tax loss for purposes of determining his base offense level for Count 1 under the sentencing guidelines or the factual basis for the restitution order on Count 2. These arguments are without merit.

Aubin was sentenced under the United States Sentencing Guidelines (U.S.S.G.) for his conviction on Count 1, conspiracy to impede or impair the function of the

IRS. A sentence imposed under the Guidelines must be upheld "so long as it is the result of a correct application of the Guidelines to factual findings which are not clearly erroneous." *United States v. McCord*, 33 F.3d 1434, 1453 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 2558 (1995).

Aubin contends that there is no factual basis for the district court's calculation of the tax loss used to determine the base offense level for the Guidelines sentence imposed on Court 1. In the presentence report (PSR), the probation officer assigned to the case set forth a calculation of the tax loss and indicated that the calculation was based on information received from IRS investigative agents. A district court is entitled to rely on information in the PSR if it has "some minimum indicium of reliability." *United States v. Morris*, 46 F.3d 410, 425 (5th Cir.), *cert. denied*, 115 S.Ct. 2595 (1995). The district court reasonably concluded that the information provided by the agents who investigated the case was reliable.

Aubin bore the burden of demonstrating that the information in the PSR was inaccurate. *United States v. Vela*, 927 F.2d 197, 201 (5th Cir.), *cert. denied*, 502 U.S. 875 (1991). Aubin does not point to any evidence that would have met that burden, and completely fails to show that the district court's determination was clearly erroneous.

Aubin also contends that there is an insufficient factual basis for the restitution imposed on Count 2, bank fraud, which was a pre-guidelines offense. District courts are accorded broad discretion in ordering restitution. *United States v. Ryan*, 874 F.2d 1052, 1054 (5th Cir. 1989). This Court will review a district court's determination of the amount of restitution to be paid by a defendant only for abuse of discretion. *United States v. Plewniak*, 947 F.2d 1284, 1290 (5th Cir. 1991), *cert. denied*, 502 U.S. 1120 (1992).

In the initial PSR, the probation officer noted that the loss to the RTC had not yet been determined, but estimated the loss to be approximately $43,000,000. The RTC's subsequent letter to the probation officer provided calculations demonstrating losses from Aubin's bank fraud of $22,529,484.30 in principal. and $21,244,067.95 in accrued interest, for a total loss of $43,773,552.25. The district court ordered restitution in this amount. Under the circumstances, we find that the RTC's letter provided an adequate factual basis for the district court's restitution order. The district court's restitution order was not an abuse of discretion.

III. CONCLUSION

For the reasons given above, defendant Aubin's convictions and sentence are AFFIRMED.

APPENDIX B

U.S. COURT OF APPEALS
FILED
OCT 3 1996
CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-10954

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GEORGE AUBIN,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

On Petition for Rehearing and Suggestion for Rehearing En Banc

(Opinion 87 F.3d 141, 5th Cir., 6/24/96)

Before WISDOM, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:

The petition for Rehearing is **DENIED** and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also **DENIED**.

ENTERED FOR THE COURT:

/s/ Robert M. Parker
United States Circuit Judge